No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed May 25, 2018
Certiorari Granted November 2, 2018

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Relevant Docket Entries

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY (LEXINGTON)

Ricky Lee Smith,
Plaintiff,
v.
Commissioner of SSA,
Defendant.

No. 5:16-cv-00003-DLB

NO.	DATE	DESCRIPTION
1	01/05/2016	COMPLAINT.
		* * *
8	03/14/2016	MOTION to Dismiss by Commissioner of SSA.
9	03/31/2016	RESPONSE in Opposition re 8 MOTION to Dismiss by Commissioner of SSA.
		* * *
11	04/14/2016	REPLY to Response to Motion re 8 MOTION to Dismiss by Commissioner of SSA.
		* * *
13	01/12/2017	MEMORANDUM ORDER: 1. Defendant's Motion to Dismiss 8 is granted; 2. Plaintiff's Complaint 1 is dismissed and

NO.	DATE	DESCRIPTION
		matter is stricken from active docket.
14	01/12/2017	JUDGMENT: 1. Plaintiff's complaint against Commissioner is DISMISSED WITH PREJUDICE.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ricky Lee Smith,
Plaintiff – Appellant,

v.

Commissioner of Social Security,
Defendant – Appellee.

No. 17-5809

NO.	DATE	DESCRIPTION
1	07/07/2017	Civil Case Docketed.
		* * *
13	09/12/2017	APPELLANT BRIEF filed.
		* * *
20	10/05/2017	APPELLEE BRIEF filed.
		* * *
22	01/26/2018	OPINION and JUDGMENT filed: AFFIRMED.
		* * *

Administrative Law Judge Decision (Mar. 26, 2014)

SOCIAL SECURITY ADMINISTRATION
Refer To: [redacted]

Office of Disability Adjudication and Review
SSA ODAR Hearing Office
Suite 210
2241 Buena Vista Road
Lexington, KY 40505

Date: March 26, 2014

Form HA-L76-OP2 (03-2010)

Ricky Lee Smith
80 John Street
Jackson, KY 41339

Notice of Decision – Unfavorable

I carefully reviewed the facts of your case and made the enclosed decision. Please read this notice and my decision.

If You Disagree With My Decision

If you disagree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must ask in writing that the Appeals Council review my decision. You may use our Request for Review form (HA-

520) or write a letter. The form is available at www.socialsecurity.gov. Please put the Social Security number shown above on any appeal you file. If you need help, you may file in person at any Social Security or hearing office.

Please send your request to:

Appeals Council
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255

Time Limit To File An Appeal

You must file your written appeal **within 60 days** of the date you get this notice. The Appeals Council assumes you got this notice 5 days after the date of the notice unless you show you did not get it within the 5-day period.

The Appeals Council will dismiss a late request unless you show you had a good reason for not filing it on time.

What Else You May Send Us

You or your representative may send us a written statement about your case. You may also send us new evidence. You should send your written statement and any new evidence **with your appeal**. Sending your written statement and any new evidence with your appeal may help us review your case sooner.

How An Appeal Works

The Appeals Council will consider your entire case. It will consider all of my decision, even the parts with which you agree. Review can make any part of my decision more or less favorable or unfavorable to you. The rules the Appeals Council uses are in the Code of Federal Regulations, Title 20, Chapter III, Part 416 (Subpart N).

The Appeals Council may.

- Deny your appeal,
- Return your case to me or another administrative law judge for a new decision,
- Issue its own decision, or
- Dismiss your case.

The Appeals Council will send you a notice telling you what it decides to do. If the Appeals Council denies your appeal, my decision will become the final decision.

The Appeals Council May Review My Decision On Its Own

The Appeals Council may review my decision even if you do not appeal. If the Appeals Council reviews your case on its own, it will send you a notice within 60 days of the date of this notice.

When There Is No Appeals Council Review

If you do not appeal and the Appeals Council does not review my decision on its own, my decision will

become final. A final decision can be changed only under special circumstances. You will not have the right to Federal court review.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits or not qualify for benefits at all. If you disagree with my decision, you should file an appeal within 60 days.

If You Have Any Questions

We invite you to visit our website located at www.socialsecurity.gov to find answers to general questions about social security. You may also call (800) 772-1213 with questions. If you are deaf or hard of hearing, please use our TTY number (800) 325-0778.

If you have any other questions, please call, write, or visit any Social Security office. Please have this notice and decision with you. The telephone number of the local office that serves your area is (866) 366-4920. Its address is:

Social Security
850 Ky-15 N
Jackson, KY 41339-8284

Robert B. Bowling
Administrative Law Judge

Enclosures.
Decision Rationale
Form HA-L39 (Exhibit List)

cc: Wolodymyr Cybriwsky, Esq
214 South Central Ave
Prestonsburg, KY 41653

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF	**CLAIM FOR**
Ricky Lee Smith (Claimant)	Supplemental Security Income
_____ (Wage Earner)	[redacted] (Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

On August 7, 2012, the claimant filed an application for supplemental security income, alleging disability beginning September 18, 1987. The claim was denied initially on September 6, 2012, and upon reconsideration on December 6, 2012. Thereafter, the claimant filed a written request for hearing on December 14, 2012 (20 CFR 416.1429 *et seq.*) On February 18, 2014, the undersigned held a video hearing (20

CFR 416.1436(c)) The claimant appeared in Hazard, Kentucky, and the undersigned presided over the hearing from Lexington, Kentucky. Laura Whitten, an impartial vocational expert, also appeared at the hearing. The claimant is represented by Wolodymyr Cybriwsky, an attorney.

Under Social Security Administration (SSA) policy, if a determination or decision on a disability claim has become final, the Agency may apply administrative res judicata with respect to a subsequent disability claim under the same title of the Act if the same parties, facts, and issues are involved in both the prior and subsequent claims. However, if the subsequent claim involves deciding whether the claimant is disabled during a period that was not adjudicated in the final determination or decision on the prior claim, SSA considers the issue of disability with respect to the unadjudicated period to be a new issue that prevents the application of administrative *res judicata*. Thus, when adjudicating a subsequent disability claim involving an unadjudicated period, SSA considers the facts and issues *de novo* in determining disability with respect to the unadjudicated period. The Sixth Circuit concluded that where a final decision of SSA after a hearing on a prior disability claim contains a finding of a claimant's residual functional capacity, SSA may not make a different finding in adjudicating a subsequent disability claim with an unadjudicated period arising under the same title of the Act as the prior claim unless new and additional evidence or changed circumstances provide a basis for a different finding of the claimant's residual functional capacity (Acquiescence Ruling 98-4 (6), *Drummond v Commissioner of Social Security*, 126 F 3d 837 (6th Cir 1997)).

In this case, the record shows that on September 18, 1987, the claimant filed an application for a supplemental security income. On October 13, 1988, an Administrative Law Judge issued a favorable decision (Exhibit B4A). The claimant received benefits until October 2004, when he was found to be over the resource limit for supplemental security income (Exhibit B178). The undersigned now finds that the current claim involves deciding whether the claimant is disabled during a period that was not adjudicated in the final decision on the prior claim, and, as discussed in detail in the decision below, the undersigned finds that the record contains new and additional evidence that provides a basis for a different outcome. In the more than 25 years since the 1988 decision, the claimant's condition has changed. He has developed a new impairment of hypertension, and his older back tumor and urinary tract infections have required less treatment.

ISSUES

The issue is whether the claimant is disabled under section 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

Although supplemental security income is not payable prior to the month following the month in which the application was filed (20 CFR 416.335), the undersigned has considered the complete medical history consistent with 20 CFR 416.912(d).

After careful consideration of all the evidence, the undersigned concludes the claimant has not been under a disability within the meaning of the Social Security Act since August 7, 2012, the date the application was filed.

APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 416.920(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 416.972(a)). "Gainful work activity" is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he has demonstrated the ability to engage in SGA (20 CFR 416.974 and 416.975). If an individual engages in SGA, he is not disabled regardless of how severe his physical or mental impairments are and regardless of his age, education, and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 416.920(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 416.921, Social Security Rulings (SSRs) 85-28, 96-3p and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, he is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925, and 416.926). If the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of a listing and meets the duration requirement (20 CFR 416.909), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 416.920(e)). An individual's residual functional capacity is his ability to do physical and mental work

activities on a sustained basis despite limitations from his impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 416.920(e) and 416.945, SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 416.920(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 416960(b) and 416.965). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 416.920(g)), the undersigned must determine whether the claimant is able to do any other work considering his residual functional capacity, age, education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Secu-

rity Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 416.912(g) and 416.960(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant has not engaged in substantial gainful activity since August 7, 2012, the application date (20 CFR 416.971 *et seq.*).

The claimant testified that he has not worked since the 1980s. Records show a lack of income after 1985 (Exhibit B2D/l). Accordingly, the claimant has not engaged in substantial gainful activity since his application date.

2. The claimant has the following medically determinable impairments: disorders of the spine, urinary tract infections, diverticulitis, hypertension, depression, and anxiety (20 CFR 416.921 *et seq.*).

3. The claimant does not have an impairment or combination of impairments that has significantly limited (or is expected to significantly limit) the ability to perform basic work-related activities for 12 consecutive months; therefore, the claimant docs not have a severe impairment or combination of impairments (20 CFR 416.921 *et seq.*).

Basic work activities are the abilities and aptitudes necessary to do most jobs. Examples of these include:

1. Physical functions such a walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling,

2. Capacities for seeing, hearing, and speaking,

3. Understanding, carrying out, and remembering simple instructions,

4. Use of judgment,

5. Responding appropriately to supervision, coworkers, and usual work situations; and

6. Dealing with changes in a routine work setting (SSR-85-28).

In reaching the conclusion that the claimant does not have an impairment or combination of impairments that significantly limits his ability to perform basic work activities, the undersigned has considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 416.929 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 416.927 and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

In considering the claimant's symptoms, the undersigned must follow a two-step process in which it must first be determined whether there is an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown

by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the claimant's pain or other symptoms.

Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the claimant's pain or other symptoms has been shown, the undersigned must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which they limit the claimant's functioning. For this purpose, whenever statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the undersigned must make a finding on the credibility of the statements based on a consideration of the entire case record.

The claimant alleged that he became disabled in September 1987 due to a tumor on his spine. The growth was removed but subsequently resurfaced. The claimant asserted that he has pain and a sensation of bee stings in his hands, back, feet, and left leg. As a result, he is unable to sit more than 20 minutes, stand more than 20 minutes, walk more than a half mile, or lift and carry more than a gallon of milk. The back complications have caused the claimant to need to self-catheterize since 1997, resulting in urinary tract infections. Doctors responded by prescribing the claimant Lortab for pain, Phenergan for nausea, Dicyclomine for diverticulitis, and Lisinopril for hypertension (Exhibit B12E/1). The claimant was prescribed Prilosec for acid reflux but can no longer afford the medication. He stated that the prescriptions do not have side effects.

The 1988 favorable disability decision followed the identification and removal of a tumor on the claimant's lumbar spine (Exhibit B3F/89, 98-100). The lesion extended from L2-L4 and contributed to urinary frequency and hesitancy (Exhibit B3F/98). However, the tumor had resurfaced by 1996, prompting John Gilbert, M.D. to recommend a second surgery (Exhibit B8F/80). The claimant initially declined, and the mass remained stable through 2002 (Exhibit B3F/35). He later testified that a tumor was removed in 2002 or 2003, but an updated imaging report from August 2006 showed a recurrent growth and disc protrusion at L2-L3 (Exhibits B1F/6, B3F/2). The claimant continued experiencing back pain in the year leading up to his current application for disability benefits (Exhibit B9F/21). In June 2011, he informed treating physician Edwin Santos, M.D. that he had nausea as well as pain in his low back and feet, which favorably responded to prescriptions Phenergan and Lortab (Exhibit B9F/21-22). Dr. Santos identified tenderness in the claimant's mid-back region but noted that the claimant had no similar problems in the lower extremities (Exhibit B9F/22). Despite the complaints, the claimant retained a normal gait (Exhibit B9F/22). An April 2012 update revealed that he denied back pain when in the emergency room for a urinary tract infection (Exhibit B8F/10). Medical professionals at the hospital observed the claimant's normal extremity movement and ambulatory ability (Exhibit B8F/8). When the claimant returned to Dr. Santos's office in July 2012, he saw nurse Mike Myers, APRN (Exhibit B9F/39). Mr. Myers again found tenderness in the lumbar spine and kept the claimant on his existing prescriptions (Exhibit B9F/39). The claimant retained a normal gait in subsequent appointments (Exhibit

B10F/2). In January 2013, Mr. Myers began identifying reduced spinal range of motion, including a positive straight-leg raising test (Exhibit B12F/2). The results were repeated in the most recent record from March, but in both appointments the claimant retained a normal gait (Exhibit 12F/4). The updates also differed from prior reports because Mr. Myers no longer found tenderness in the spinal region (Exhibit B12F/2). The claimant testified at his hearing that the pain-related impairments are controlled by his prescription Lortab. This admission, combined with the observations of a normal gait and the lack of recent spinal treatment, support a finding that the back disorder is not severe.

The claimant's back-related urinary problems have been exacerbated by his poor finances, which cause him to use old catheters. In March 2005, urologist Thomas Slabaugh, M.D., admitted the claimant to the hospital for four days with a chronic urinary infection (Exhibit B1F/6). Dr. Slabaugh responded with antibiotics and sterile catheters before discharging the claimant with prescription Keflex (Exhibit B1F/5). However, the claimant's financial problems continued to interfere with proper catheter usage and resulted in repeated infections (Exhibit B4F/3). The most recent documented emergency room visit for the condition occurred in April 2012 (Exhibit B8F/5). Hospital staff noted that the claimant had inguinal swelling and provided him with medications (Exhibit B8F/5). The claimant testified that he no longer receives hospital care for urinary tract infections. Instead, Mr. Myers provides him with antibiotics to take at home. The lack of treatment following the alleged onset date undermines allegations that the urinary tract infections are severe.

In August 2011, Dr. Santos identified a slightly elevated blood pressure of 121/61 and added hypertension to the claimant's list of impairments (Exhibit B9F/23). He ultimately responded with prescription Lisinopril (Exhibit B9F/41). The hypertension persisted under the monitoring of Mr. Myers with blood pressures rising to 122/76 in January 2013 and 130/80 in March 2013 (Exhibit B12F/1-3). Despite the diagnosis, the claimant admitted at his hearing that Lisinopril controls his hypertension. The close proximity of the claimant's blood pressure to 120/80 while on the prescription supports a finding that it is not severe.

Stephen Schindler, M.D. identified loose bowel movement complications as early as May 2001 (Exhibit B2F/3). The condition improved by October 2003, when Dr. Schindler described a lack of constipation, diarrhea, and rectal bleeding (Exhibit B2F/13). The physician indicated that the claimant did not have digestive symptoms while taking prescription Phenergan (Exhibit B2F/15, 17). The impairments do not appear in records following the August 2012 application for disability, and the claimant admitted that his diverticulitis was controlled on prescription Dicyclomine. Accordingly, it is not severe.

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision.

The claimant has not worked since 1986 (Exhibit B12E/1). His lack of employment is consistent with the alleged onset date and the prior favorable deter-

mination. However, the medical record and the claimant's own testimony demonstrate that his conditions have improved with prescribed treatment. The claimant's spinal disorder has not interfered with his normal gait, and his back tenderness has diminished in recent treatment notes (Exhibits B9F/22, B12F/2, 4).

Mr. Myers's identification of positive straight-leg raising tests in 2013 has not been confirmed by an acceptable medical source (Exhibit B12F/2,4). Meanwhile, the claimant described his diverticulitis and hypertension as controlled with medications. The urinary tract infections persist due to his inability to afford sterile catheters, but Mr. Myers has responded to them with at-home care rather than repeated hospitalizations. The claimant's testimony that he is not able to afford Prilosec and other forms of treatment is undermined by his continued smoking habit of a half pack per day. The use of cigarettes raises questions about resource allocation. In addition, the claimant's ability to live alone suggests that he performs a variety of chores that are inconsistent with his purported sitting, standing, walking, lifting, and carrying limitations.

As for the opinion evidence, the undersigned has evaluated each medical source's relationship to the claimant. 20 CFR 404.1527(d). Specifically, the factors considered were whether the professional examined the claimant, whether they served as a treating source, their area of specialty if any, the supportability of medical opinions, consistency with the record, and their knowledge of the procedure and the record as a whole.

The undersigned grants great weight to state agency consultant Carlos Hernandez, M.D. for finding no severe physical impairments (Exhibits B4A/7). Dr.

Hernandez's opinion is consistent with the claimant's above-mentioned response to treatment and the lack of continued care he has needed during the relevant period.

Mr. Myers receives little weight for his non-acceptable medical opinion under SSR 06-3p. The nurse opined that the claimant could not sit, stand, or walk for a combination of 8 hours per workday, thereby precluding employment (Exhibit B11F/2). Mr. Myers partially attributed the limitations to reduced strength in the claimant's lower extremities (Exhibit B11F/2). He also identified a positive straight-leg raising test in his 2013 reports (Exhibit 12F/2, 4). However, the opinion appears inconsistent with Dr. Santos's description of no tenderness in the lower extremities (Exhibit 9F/22). In addition, the claimant retained a normal gait throughout the record (Exhibits B8F/8; 9F/22, B10F/2).

The claimant's uncle, James Campbell, receives some weight for describing his nephew's impairments and limitations (Exhibit B6E). Despite identifying exertional restrictions, Mr. Campbell explained that the claimant remained able to live alone, care for his personal hygiene, prepare meals, wash laundry, and shop for necessities (Exhibit B6E/3-6). These activities are consistent with the nonsevere finding.

In terms of the mental impairments, state agency consultant Ilze Sillers, Ph.D. receives some weight for finding no medically determinable condition (Exhibit B4A/7). The claimant did not specifically allege depression or anxiety and testified that he had not pursued treatment for the conditions (Exhibit B4A/7). However, the undersigned still considered the impairments because they are referenced in the medical record by Dr. Gilbert and Dr. Schindler (Exhibits B2F/13,

B3F/76). The lack of treatment supports a finding that the depression and anxiety are not severe. Because the claimant has medically determinable mental impairments, the undersigned has considered the four broad functional areas set out in the disability regulations for evaluating mental disorders and in section 12.000C of the Listing of Impairments (20 CFR, Part 404, Subpart P, Appendix 1). These four broad functional areas are known as the "paragraph B" criteria.

The first functional area is activities of daily living. This is the only area in which the claimant has a limitation, and it is a mild one. The claimant testified that he does not wash dishes, vacuum, mop, garden, or mow his lawn. He does not usually cook, instead relying on meals away from the home. The claimant's difficulties appear to be the result of his physical rather than mental condition, though Dr. Gilbert and Dr. Schindler indicated there existed a strong correlation between the two (Exhibits B2F/13, B3F/76). The claimant retains the ability to live alone and drive a vehicle four or five times per week. He drove to his hearing from Cleveland, Ohio, where he was temporarily living to escape his unheated home.

The next functional area is social functioning. In this area, the claimant has no limitation. He described engaging in daily social activities. The claimant visits with friends that operate a gas station and a fruit stand. He also shops in stores and eats in restaurants. The claimant described attending high school basketball games on an infrequent basis.

The third functional area is concentration, persistence or pace. In this area, the claimant has no limitation. The record lacks evidence of attention difficulties, and the claimant admitted that he is able to concentrate on television and paying his bills.

The fourth functional area is episodes of decompensation. In this area, the claimant has experienced no episodes of decompensation which have been of extended duration.

Because the claimant's medically determinable mental impairments cause no more than "mild" limitation in any of the first three functional areas and "no" episodes of decompensation which have been of extended duration in the fourth area, they are nonsevere (20 CFR 416.920a(d)(1)).

In sum, the claimant's physical and mental impairments, considered singly and in combination, do not significantly limit the claimant's ability to perform basic work activities. Thus, the claimant does not have a severe impairment or combination of impairments.

4. The claimant has not been under a disability, as defined in the Social Security Act, since August 7, 2012, the date the application was filed (20 CFR 416.920(c)).

DECISION

Based on the application for supplemental security income filed on August 7, 2012, the claimant is not disabled under section 1614(a)(3)(A) of the Social Security Act.

/s/ Don C. Paris

for Robert B. Bowling
Robert B. Bowling
Administrative Law Judge

March 26, 2014
Date

Letter from Wolodymyr Cybriwsky to Appeals Council (Apr. 24, 2014)

Law Offices of
WOLODYMYR CYBRIWSKY
214 S. CENTRAL AVENUE
PRESTONSBURG, KENTUCKY 41653
PHONE: (606) 886-8389
FAX: (606) 886-1329

April 24, 2014

Appeals Council
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255

RE: Exceptions on Ricky Lee Smith
SSN: [redacted]-7791

Dear Sirs:

This is to acknowledge the receipt of Mr. Smith's denial decision dated March 26, 2014 and to hereby request a review which should result in a reversal and remand of this denial decision.

As the principal basis for vacating this denial decision, counsel notes that an ALJ Robert B. Bowling was assigned and had jurisdiction over this claim, and it was ALJ Robert B. Bowling who appeared and presided over Mr. Smith's claim 2/18/2014 televideo hearing, yet this denial decision of March 26, 2014 is signed by ALJ Don C. Paris, who took no part in Mr. Smith and obviously should have had no part in adjudicating Mr. Smith's claim. Allowing an ALJ who was never assigned to Mr. Smith's case, to then author

a denial decision is prima facie evidence of a decision which is not supported by substantial evidence and threatens to transform Mr. Smith's right to a de novo hearing into a mockery.

The only possible basis for allowing another ALJ to author an adjudication in which ALJ Robert B. Bowling presided is if ALJ Bowling died, retired, resigned, was ill or on leave from the Lexington Hearing Office for a period of twenty (20) days or more in February 2014 – March 26, 2014 period. Counsel contacted the Lexington office and confirmed that ALJ Bowling is alive, active, healthy and has not been absent from the office during this period and is continuing to hold hearings and presumably make adjudications. As such NONE of the conditions set forth in HALLEX 1-2-8-40 have even been considered let alone met. On that error alone and the clear violation of HALLEX 1-2-8-40, a copy of which we have enclosed, please take swift and corrective action. As a final note on this point, even if ALJ Paris could have qualified to author this adjudication, that HALLEX would have only allowed him to issue a fully favorable decision. Anything less would have required at least a supplemental hearing. Here, contrary to all the Commissioner's rules and regulations, a non-presiding ALJ discredits the Claimant's testimony and complaints and issues a denial decision.

Further, the Social Security Act provides that each Claimant has the statutory right to a de novo hearing under 42 U.S.C. § 405 (b) and due process rights under the Fifth Amendment, Fleming v. Nestor 363 U.S. 603, 611 (1960). Those right and guarantees were mocked by the Commissioner by this adjudication.

Second, as we pointed out to the presiding ALJ at the outset of the 2/18/2014 hearing, Mr. Smith was adjudicated to be disabled by the Social Security Administration back on 9/18/1987. He continued to be disabled and draw Social Security benefits until October 2004 at which time he was found ineligible due to excess resources. We again attach a statement from the Social Security District Office dated 2/18/2014 confirming that fact. Given that there is no SSA finding that Mr. Smith's medical condition has ever improved, once the resource issue had been resolved in Mr. Smith's favor, Mr. Smith should have been found eligible to again receive benefits. Clearly that did not occur here, when the SSA chose to disregard its previous finding of disability. Failure to obtain that earlier claims file and the evidence it contains fatally compromises any future adjudication, because it violates the requisites set forth in Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). The mere recitation by a non-participating ALJ claiming that Claimant's medical condition has changed in more than 25 years (see page 2 of 9) does not remotely satisfy the requirements of Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). Further, none of the "new and additional evidence" in this record document any medical improvement from Mr. Smith's previous disabled status, because none of medical examiners were even aware that there was a previous finding of disability or that the standard for review is whether or not Mr. Smith's medical condition has improved. With an incomplete record and the wrong standard of review, this denial decision is even more unsupported by the substantial evidence in the

record and needs to be vacated and remanded with strong corrective action.

Counsel can also show further that the probative medical evidence in this record proves that Mr. Smith continues to remain disabled, but given the substantial errors that have been identified above, that discussion will he held later when we have an appropriate record and the above errors are corrected.

WHEREFORE, counsel requests proper Order from the Appeals Council.

Respectfully submitted,

/s/Wolodymyr Cybriwsky
WOLODYMYR CYBRIWSKY

WC/mr
Enclosures

1-2-8-40. Administrative Law Judge Conducts Hearing but Is Unavailable to Issue Decision

Last Update: 5/16/08 (Transmittal I-2-71)

When an Administrative Law Judge (ALJ) who conducted a hearing in a case is not available to issue the decision because of death, retirement, resignation, illness which has caused the ALJ to be on leave for such illness for at least twenty days and which illness would keep the ALJ from fulfilling necessary duties, or other cause resulting in prolonged leave of twenty or more days, the Hearing Office Chief ALJ

(HOCALJ) will reassign the case to another ALJ. The ALJ to whom the case is reassigned will review the record and determine whether or not another hearing is required to issue a decision. The ALJ's review will include all of the evidence of record, including the audio recording of the hearing.

- If the ALJ is prepared to issue a fully favorable decision, another hearing would not be necessary.
- If the ALJ is prepared to issue a less than fully favorable decision, another hearing may be necessary. For example, another hearing would be necessary if relevant vocational expert opinion was not obtained at the hearing, or the claimant alleges disabling pain, and the ALJ believes the claimant's credibility and demeanor could be a significant factor in deciding the case.

If the ALJ holds a new hearing, the ALJ will consider all pertinent documentary evidence admitted into the record at the prior hearing, the oral testimony at the prior hearing, and the evidence and testimony adduced at the new hearing.

When a case is designated a critical case pursuant to HALLEX I-2-1-40, and the ALJ to whom such case is assigned is on leave for any reason for an extended period of time, the HOCALJ may, but is not required to, reassign the case to another ALJ. If reassignment is made, the ALJ to whom the case is reassigned will conduct the review in the same manner as for mandatory reassignment described above.

When an ALJ has approved a final decision draft but is unavailable to sign the final decision, the HOCALJ will have authority to sign the final deci-

sion/order on behalf of the ALJ who is temporarily unavailable to sign the final decision/order if the ALJ gave the HOCALJ prior affirmative written authorization to sign the decision/order for the ALJ

The authorization may be contained in an e-mail, fax, or other writing that includes all of the following:

- An affirmative statement that ALJ has read the decision/order; and
- An affirmative statement that the ALJ concurs with the decision/order as written, or, concurs with the decision/order with specified changes previously reviewed and approved by the ALJ before authorization; and
- An affirmative statement that "HOCALJ X" is authorized to sign the decision/order

The ALJ must sign any non email paper document affirmative written authorization with his/her "wet" signature. A **rubber** stamp or other mechanical signature is not acceptable or authorized under any circumstances. (See HALLEX 1-2-8-1 General). If the above requirements are met, the HOCALJ would sign the decision/order "HOCALJ John Doe for ALJ Jane Smith."

The final decision/order signed by the HOCALJ, the draft decision/order approved by the ALJ and the ALJ's written authorization for the HOCALJ to sign the final decision/order on his/her behalf will be retained in the claims folder.

Fax from Wolodymyr Cybriwsky to Brad Salisbury (Sept. 21, 2014)

TRANSMITTAL

Attn:	Brad Salisbury
To:	Social Security Administration Jackson District Office
Of:	Jackson, KY. 41339
Fax:	(606) 666-9010
Phone:	(866) 295-4814
Pages:	6
Date:	9/21/2014

Re: Ricky Lee Smith
SSN: [redacted]-7791

Dear Sir or Madam,

Enclosed please a copy of the appeal which we filed with the Appeals Council on Mr. Smith's denial of 3/26/2014. This appeal was mailed to the Appeals Council back on 4/24/2014. Please advise us of the status of this appeal. If there are questions, please contact us. Thank you for your time and attention.

This information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually re-

ceiving this facsimile or any other reader of the facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

*NOT COUNTING COVER SHEET, IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (606) 886-8389.

/s/ Wally
Wally

EXHIBIT #3

From the desk of...
Wolodymyr Cybriwsky, Esq.
214 South Central Avenue
Prestonsburg, Kentucky 41653
(606) 886-8389
Fax: (606) 886-1329

Law Offices of
WOLODYMYR CYBRIWSKY
214 S. CENTRAL AVENUE
PRESTONSBURG, KENTUCKY 41653
PHONE: (606) 886-8389
FAX: (606) 886-1329

April 24, 2014

Appeals Council
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255

RE: Exceptions on Ricky Lee Smith
SSN: [redacted]-7791

Dear Sirs:

This is to acknowledge the receipt of Mr. Smith's denial decision dated March 26, 2014 and to hereby request a review which should result in a reversal and remand of this denial decision.

As the principal basis for vacating this denial decision, counsel notes that an ALJ Robert B. Bowling was assigned and had jurisdiction over this claim, and it was ALJ Robert B. Bowling who appeared and presided over Mr. Smith's claim 2/18/2014 televideo hearing, yet this denial decision of March 26, 2014 is signed by ALJ Don C. Paris, who took no part in Mr. Smith and obviously should have had no part in adjudicating Mr. Smith's claim. Allowing an ALJ who was never assigned to Mr. Smith's case, to then author a denial decision is prima facie evidence of a decision which is not supported by substantial evidence and threatens to transform Mr. Smith's right to a de novo hearing into a mockery.

The only possible basis for allowing another ALJ to author an adjudication in which ALJ Robert B. Bowling presided is if ALJ Bowling died, retired, resigned, was ill or on leave from the Lexington Hearing Office for a period of twenty (20) days or more in February 2014 – March 26, 2014 period. Counsel contacted the Lexington office and confirmed that ALJ

Bowling is alive, active, healthy and has not been absent from the office during this period and is continuing to hold hearings and presumably make adjudications. As such NONE of the conditions set forth in HALLEX 1-2-8-40 have even been considered let alone met. On that error alone and the clear violation of HALLEX 1-2-8-40, a copy of which we have enclosed, please take swift and corrective action. As a final note on this point, even if ALJ Paris could have qualified to author this adjudication, that HALLEX would have only allowed him to issue a fully favorable decision. Anything less would have required at least a supplemental hearing. Here, contrary to all the Commissioner's rules and regulations, a non-presiding ALJ discredits the Claimant's testimony and complaints and issues a denial decision.

Further, the Social Security Act provides that each Claimant has the statutory right to a de novo hearing under 42 U.S.C. § 405 (b) and due process rights under the Fifth Amendment, Fleming v. Nestor 363 U.S. 603, 611 (1960). Those right and guarantees were mocked by the Commissioner by this adjudication.

Second, as we pointed out to the presiding ALJ at the outset of the 2/18/2014 hearing, Mr. Smith was adjudicated to be disabled by the Social Security Administration back on 9/18/1987. He continued to be disabled and draw Social Security benefits until October 2004 at which time he was found ineligible due to excess resources. We again attach a statement from the Social Security District Office dated 2/18/2014 confirming that fact. Given that there is no SSA finding that Mr. Smith's medical condition has ever improved, once the resource issue had been resolved in Mr.

Smith's favor, Mr. Smith should have been found eligible to again receive benefits. Clearly that did not occur here, when the SSA chose to disregard its previous finding of disability. Failure to obtain that earlier claims file and the evidence it contains fatally compromises any future adjudication, because it violates the requisites set forth in Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). The mere recitation by a non-participating ALJ claiming that Claimant's medical condition has changed in more than 25 years (see page 2 of 9) does not remotely satisfy the requirements of Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). Further, none of the "new and additional evidence" in this record document any medical improvement from Mr. Smith's previous disabled status, because none of medical examiners were even aware that there was a previous finding of disability or that the standard for review is whether or not Mr. Smith's medical condition has improved. With an incomplete record and the wrong standard of review, this denial decision is even more unsupported by the substantial evidence in the record and needs to be vacated and remanded with strong corrective action.

Counsel can also show further that the probative medical evidence in this record proves that Mr. Smith continues to remain disabled, but given the substantial errors that have been identified above, that discussion will he held later when we have an appropriate record and the above errors are corrected.

WHEREFORE, counsel requests proper Order from the Appeals Council.

Respectfully submitted,

/s/Wolodymyr Cybriwsky
WOLODYMYR CYBRIWSKY

WC/mr
Enclosures

1-2-8-40. Administrative Law Judge Conducts Hearing but Is Unavailable to Issue Decision

Last Update: 5/16/08 (Transmittal I-2-71)

When an Administrative Law Judge (ALJ) who conducted a hearing in a case is not available to issue the decision because of death, retirement, resignation, illness which has caused the ALJ to be on leave for such illness for at least twenty days and which illness would keep the ALJ from fulfilling necessary duties, or other cause resulting in prolonged leave of twenty or more days, the Hearing Office Chief ALJ (HOCALJ) will reassign the case to another ALJ. The ALJ to whom the case is reassigned will review the record and determine whether or not another hearing is required to issue a decision. The ALJ's review will include all of the evidence of record, including the audio recording of the hearing.

- If the ALJ is prepared to issue a fully favorable decision, another hearing would not be necessary.

- If the ALJ is prepared to issue a less than fully favorable decision, another hearing may be necessary. For example, another hearing would be necessary if relevant vocational expert opinion was not obtained at the hearing, or the claimant alleges disabling pain, and the ALJ believes the claimant's credibility and demeanor could be a significant factor in deciding the case.

If the ALJ holds a new hearing, the ALJ will consider all pertinent documentary evidence admitted into the record at the prior hearing, the oral testimony at the prior hearing, and the evidence and testimony adduced at the new hearing.

When a case is designated a critical case pursuant to HALLEX I-2-1-40, and the ALJ to whom such case is assigned is on leave for any reason for an extended period of time, the HOCALJ may, but is not required to, reassign the case to another ALJ. If reassignment is made, the ALJ to whom the case is reassigned will conduct the review in the same manner as for mandatory reassignment described above.

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The authorization may be contained in an e-mail, fax, or other writing that includes all of the following:

- An affirmative statement that ALJ has read the decision/order; and

- An affirmative statement that the ALJ concurs with the decision/order as written, or, concurs with the decision/order with specified changes previously reviewed and approved by the ALJ before authorization; and
- An affirmative statement that "HOCALJ X" is authorized to sign the decision/order

The ALJ must sign any non email paper document affirmative written authorization with his/her "wet" signature. A **rubber** stamp or other mechanical signature is not acceptable or authorized under any circumstances. (See HALLEX 1-2-8-1 General). If the above requirements are met, the HOCALJ would sign the decision/order "HOCALJ John Doe for ALJ Jane Smith."

The final decision/order signed by the HOCALJ, the draft decision/order approved by the ALJ and the ALJ's written authorization for the HOCALJ to sign the final decision/order on his/her behalf will be retained in the claims folder.

Letter from Brad Salisbury to Wolodymyr Cybriwsky (Oct. 1, 2014)

Social Security Administration Atlanta Region

Refer to: 7791

850 HWY 15 North
Jackson, KY 41339
(866) 366-4920
October 1, 2014

Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

Dear Sir:

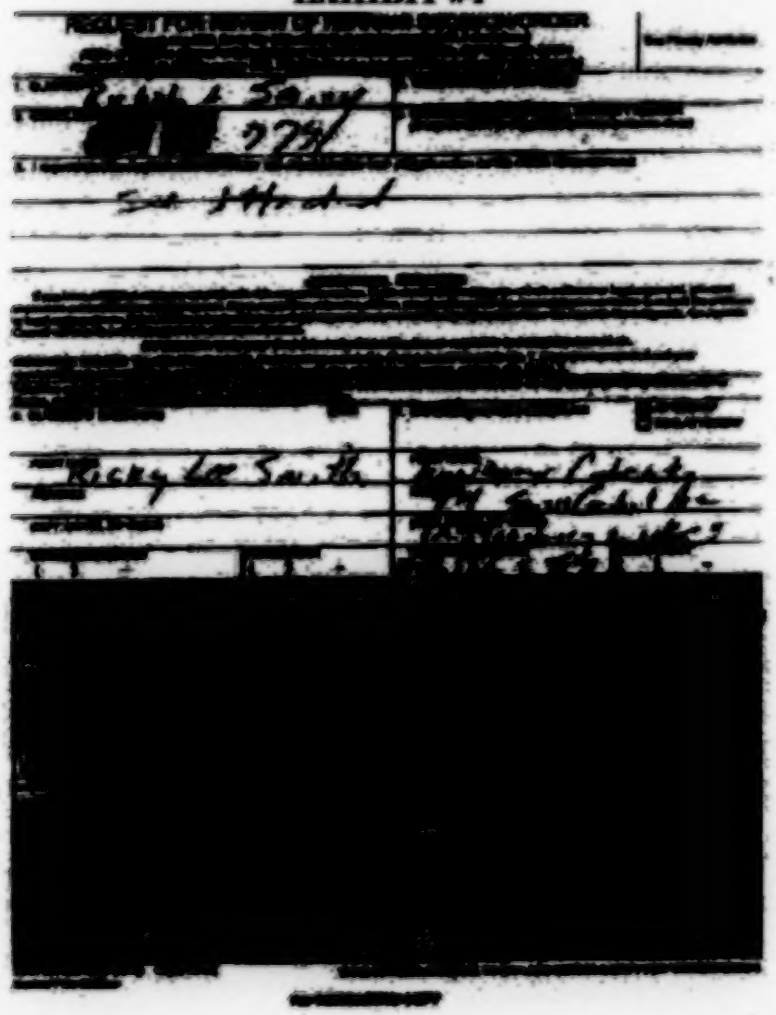
Our records still have Ricky Smith's mailing address as "80 John St, Jackson KY 41339". However, on 05/23/14 the Hearing office received Mr. Smith's copy of the ALJ 03/26/14 denial letter as Returned Mail. Please supply our office and the AC with Mr. Smith's current mailing address and phone number.

Your April Appeals Council request that you stated was mailed to the AC had not been placed in the electronic folder. If the AC had received it, they would have mailed you a receipt. Today, I completed the enclosed HA-520 and mailed it to the AC with your April letter and the September Fax sheet. I explained on an SSA 5002 that your fax sheet requesting status should serve as Good Cause for your late filing of the appeal. I did place all of the above directly into the electronic folder as well.

Therefore, the status of your AC request is that it is only being filed today, 10/01/14.

Sincerely,
Brad Salisbury, CR

EXHIBIT #4



Appeals Council Order Dismissing Review
(Nov. 6, 2015)

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255
Telephone (877) 670-2722
Date: November 6, 2015

Refer to: TLC
[redacted]-7791

NOTICE OF ORDER OF APPEALS COUNCIL DISMISSING REQUEST FOR REVIEW

Ricky Lee Smith
80 John Street
Jackson, KY 41339

What This Order Means

We have dismissed your request for review. In the enclosed order, we explain why we did this.

Under our rules, the dismissal of a request for review is final and not subject to further review.

If You Have Any Questions

If you have any questions, you may call, write, or visit any Social Security office. If you do call or visit an office, please have this notice with you. The telephone number of the local office that serves your area is (866)366-4920. Its address is:

Social Security
850 Ky-15 N
Jackson, KY 41339-8284

John Dawkins
Administrative Appeals Judge

cc:
Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

ORDER OF APPEALS COUNCIL

In the case of	**Claim for**
Ricky Lee Smith (Claimant)	Supplemental Security Income
_____ (Wage Earner) (Leave blank if same as above)	[redacted]-7791 (Social Security Number)

This case is before the Appeals Council on the claimant's request for review of the Administrative Law Judge's decision issued on March 26, 2014. The request for review filed on October 1, 2014, was not filed within 60 days from the date notice of the decision was received as required by 20 CFR 416.1468(a). The date of receipt of such notice is presumed to be five (5) days after the date of such notice unless a reasonable showing to the contrary is made.

The regulations provide that the Appeals Council may dismiss a request for review where the claimant has failed to file the request within the stated period of time and the time for filing has not been extended

(20 CFR 416.1471). The time period will be extended if good cause is shown for missing the deadline (20 CFR 416.1468(b)).

The claimant's representative submitted a good cause statement on October 1, 2014 indicating he had previously filed a brief on April 24, 2014. The Administration did not receive this brief before October 1, 2014, nor has the representative supplied evidence indicating it was sent within the appropriate period of time.

The Appeals Council, therefore, finds that there is no good cause to extend the time for filing and, accordingly, dismisses the claimant's request for review. The Administrative Law Judge's decision stands as the final decision of the Commissioner.

Notice of this action is hereby given by mailing a copy to the claimant and the representative.

APPEALS COUNCIL

/s/ John Dawkins
John Dawkins
Administrative Appeals Judge

Date: November 6, 2015

Claimant's Name and Address:
Ricky Lee Smith
80 John Street
Jackson, KY 41339

Representative's Name and Address:
Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

Letter from Brad Salisbury to Wolodymyr Cybriwsky (Nov. 18, 2015)

Social Security Administration Atlanta Region

Refer to: R Smith

850 HWY 15 North
Jackson, KY 41339
(866)366-4920
November 18, 2015

Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

Dear Mr. Cybriwsky:

RE: Ricky Lee Smith

I received your messages this morning that you had left on 11/16/15 and 11/17/15 concerning the Appeals Council (AC) dismissal dated 11/06/15. I tried to call your office this morning but there was no answer.

On 10/01/14 we received your fax dated 09/21/14 asking for the status of your AC request that you stated was submitted 04/24/14. Since the 04/24/14 request was not found, I placed an SSA 5002 (report of contact SSA form) in the electronic folder with a copy of your AC request dated 04/24/14. The 10/01/14 fax would serve as your good cause for late filing.

The AC stated since the Administration did not receive this brief before 10/01/14, nor has evidence been supplied indicating the AC request was sent within the appropriate time, the AC finds that there was no good cause to extend the time for filing and dismisses the request for review. Therefore, the 03/26/14 ALJ's decision stands.

At this point, you can file an action in Federal district court within 60 days from the AC's Notice of Order of Appeals Council Dismissing Request for Review dated 11/06/15.

Sincerely,

/s/ C. Brad Salisbury, CR

Complaint (Jan. 5, 2016)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON

ELECTRONICALLY FILED

CIVIL ACTION NO.

RICKY LEE SMITH — PLAINTIFF
SSN: XXX-XX-7791

VS. COMPLAINT

CAROLYN W. COLVIN,
ACTING COMMISSIONER
OF SOCIAL SECURITY — DEFENDANT

****

The Plaintiff, complaining of the Defendant, would respectfully show the Court:

I

That the Plaintiff is a citizen and resident of the United States of America and of the County of Breathitt, Commonwealth of Kentucky, that jurisdiction of this Court is founded as provided by Section 205(g) of the Social Security Act, as amended, Section 405(g), Title 42, United States Code.

II

That an application was filed by the Plaintiff with the Social Security Administration, that said application was filed by the above named Plaintiff to establish for himself a period of disability in accordance with the laws of the United States of America.

That this matter was heard before the Administrative Law Judge who ruled that the Plaintiff was not entitled to a period of disability. That denial decision was timely appealed to the Appeals Council on April 24, 2014 which the Appeals Council improperly dismissed on November 6, 2015.

III

That the Plaintiff further alleges that he suffered due process violations in his claim by having an Administrative Law Judge(ALJ), who has no jurisdiction over his case and who had no participation in the adjudication process issue a denial decision on March 26, 2014. Without any explanation, this ALJ's decision was not only in clear violation of the commissioner's own rules and regulations as set forth under HALLEX I-2-8-40 but constitues a due process violation to the Plaintiff's right to a fair hearing.

IV

Plaintiff has exhausted all of his administrative remedies, a final decision having been rendered by the Commissioner.

IV

That this action is brought before the Court to review in the manner of judicial review for in said Section of said Act, the final decision of the Commissioner holding that the Plaintiff is not entitled to a period of disability pursuant to divisions to Sections 216(i) and 223 of the Act, respectively, as amended.

V

That the determination made by the Defendant, that the Plaintiff was not disabled, was not supported by substantial evidence.

WHEREFORE, the Plaintiff prays that the Court review the findings and determinations of the Defendant and establish for him a period of disability according to the applicable law, and for such other and proper relief as the Court deems just and proper.

/s/ WOLODYMYR CYBRIWSKY
HON. WOLODYMYR CYBRIWSKY
214 SOUTH CENTRAL AVENUE
PRESTONSBURG, KENTUCKY 41653
(606) 886-8389
wolodymycybriwsky@bellsouth.net

This the 5th day of January, 2016.

Declaration of Kathie Hartt (Feb. 19, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

RICKY LEE SMITH

Plaintiff

vs.

CAROLYN W. COLVIN
ACTING COMMISSIONER OF
SOCIAL SECURITY

Defendant

CIVIL ACTION NO. 5:16-CV-00003

DECLARATION OF KATHIE HARTT
COURT CASE PREPARATION AND REVIEW
BRANCH 3
OFFICE OF DISABILITY ADJUDICATION AND
REVIEW
SOCIAL SECURITY ADMINISTRATION

I, KATHIE HARTT, Chief of Court Case Preparation and Review Branch 3 of the Office of Appellate Operations, Office of Disability Adjudication and Review, Social Security Administration, declare and state as follows:

(1) Under direct delegation from the Commissioner of Social Security, the Office of Disability Adjudication and Review administers a nationwide hearings and appeals program. The Office of Disability Adjudication and Review includes the Appeals Council and Administrative Law Judges who hold hearings on claims arising under Title XVI of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination of a claim. The Office of Appellate Operations provides professional and technical advice to the Deputy Commissioner and Administrative Appeals Judges of the Appeals Council in the processing of cases in which a civil action has been filed.

(2) One function of the Appeals Council is to act on requests for review of hearing decisions made by Administrative Law Judges and to either grant, deny or dismiss any such request. Under the regulations of the Social Security Administration, if the Appeals Council denies a timely request for review of a hearing decision, that hearing decision becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended (42 U.S.C. section 405(g)), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner may allow. ***"

(3) I am responsible for the processing of claims under Title XVI of the Social Security Act, as

amended, whenever a civil action has been filed in the Commonwealth of Kentucky. The official file maintained by the Office of Disability Adjudication and Review relating to the claim of the plaintiff, RICKY LEE SMITH, under Title XVI of the Social Security Act, is presently within my custody and has been examined under my supervision. To the best of my knowledge and belief said file shows that:

(a) Plaintiff filed an application for Supplemental Security Income on August 7, 2012. The application was initially denied on September 6, 2012. Plaintiff timely filed a request for reconsideration on October 1, 2012. The application was denied again on December 6, 2012. Plaintiff timely filed a request for a hearing before an Administrative Law Judge on December 14, 2012.

(b) On March 26, 2014, the Administrative Law Judge issued an unfavorable hearing decision (Exhibit 1).

(c) On October 1, 2014, Plaintiff faxed to the Social Security Administration an undated request for review form, a brief dated April 24, 2014, and a fax cover sheet dated September 21, 2014 requesting the status of the appeal (Exhibit 2).

(d) On November 6, 2015, the Appeals Council dismissed the request for review for untimely filing (Exhibit 3). The Appeals Council notice did not provide for further appeal.

(e) On January 5, 2016, Plaintiff filed a civil action in the U.S. District Court for the Eastern District of Kentucky.

In accordance with 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

February 19, 2016
Date

/s/ Kathie Hartt
KATHIE HARTT